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The International Criminal Court as a Component of U.S. National Security Strategy

by

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THE INTERNATIONAL CRIMINAL COURT AS A COMPONENT OF U.S. NATIONAL SECURITY STRATEGY

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THE INTERNATIONAL CRIMINAL COURT AS A COMPONENT OF U.S. NATIONAL SECURITY

I. Introduction

In 1991 and 1992, the world watched in horror as Bosnians committed mass atrocities against other Bosnians. In 1994, the world again watched in horror as the nation of Rwanda convulsed in a 100-day spasm of violence. During the Bosnian genocide, international peacekeepers stepped to one side. During the Rwandan genocide, which not only included perpetration of as many as one million killings, but also mass rapes, mutilations and other atrocities, the international response was equally ineffective. The small peacekeeping force provided by the United Nations Security Council (UNSC) in 1993 was not enough to reestablish peace once violence had broken out. In both cases, the UNSC either could not or would not provide more.

Having clear knowledge of past genocides committed by the Ottoman Empire, Germany, and Cambodia, and with all of its members being party to the treaty to prevent the same from ever occurring again, the fact that the UNSC, the international organ charged with maintaining international peace and security, failed so utterly in this regard showed nations they could not rely on the United Nations (UN). Because they could not rely on the UN, nations began seeking alternate methods of enhancing their security, guaranteeing their peace, and finding remedies to violations of the same. The failure of the international security system to respond adequately raised the questions of whether the system was irretrievably broken, and what could be done to prevent future atrocities.

In light of these horrific events, an assembly of nations created the International Criminal Court (ICC). The Court, the first permanent international court to have potential jurisdiction over individuals, serves many purposes in the international system. As a tangible organ dedicated to the rule of international law, the Court serves both a retrospective purpose, dispensing retributive justice, and a prospective purpose, deterring future violations of the Rome Statute (RS). The United States Government voiced numerous objections to the Court. The Court and its prosecutor have shown these objections to be insubstantial over time. The relationship between the United States and the Court has progressed to the point where the U.S. can seriously consider becoming a party to the treaty and a member of the Court.

This paper intends to be a consideration of the current state of affairs and future involvement of the United States in the ICC. After a discussion of how developing the rule of law serves as a component of U.S. national security, this paper will examine how the continued and expanded jurisdiction of the ICC could serve to advance the U.S. national security interests through improving the rule of law. This paper also will examine past and continuing objections the United States has to the ICC, comparing the stated objection to ICC practice or other legal standards to see if the Court has in any fashion set a precedent of some sort to address the stated objection. At the end, I will weigh the factors and recommend positive steps the United States can take to further its security through the ICC, including making a recommendations whether the United States should join the ICC.

II. Rule of Law as a part of U.S. National Security Strategy

In U.S. policy and under international understanding, the rule of law has several specific components. The UN has defined the rule of law as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."[1] Certain U.S. policies reflect this definition. For example, under U.S. military legal guidance, a society operating within the rule of law has seven key characteristics: (1) the state monopolizes the use of force in the resolution of disputes; (2) individuals are secure in their persons and property; (3) the state is itself bound by law and does not act arbitrarily; (4) the law can be readily determined and is stable enough to allow individuals to plan their affairs; (5) individuals have meaningful access to an effective and impartial legal system; (6) the state protects basic human rights and fundamental freedoms; and, (7) individuals rely on the existence of justice institutions and the content of law in the conduct of their daily lives.[2]

With this detailed description of the rule of law as a basis, the reader can understand the U.S. national security interest in fostering the rule of law. States who

[1] CTR FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR & SCHOOL, U.S. ARMY, RULE OF LAW HANDBOOK: A PRACTICIONER'S GUIDE FOR JUDGE ADVOCATES (2010), [hereinafter ROL Handbook].
[2] *Id*.

consistently exhibit those seven characteristics are far more likely to be open societies, with a harmony of interests when dealing with the United States on a state-to-state matter. These states are also far more likely to be fully sovereign within their own territory, and correspondingly unlikely to be sources of security concerns, such as terrorist organizations or proliferating weapons of mass destruction. In the alternative, if a state with a healthy rule of law is the source of a security concern, the United States and the UNSC can more easily determine the state in question as the source of the threat to peace and security, and hold that state accountable.

Simply because a developed rule of law in other nations is a positive development for U.S. national security does not mean the United States historically fosters the rule of law as a national security policy objective. The observer can best determine if the United States has adopted a policy of fostering the rule of law through examining what the United States says and what it does with respect to the same. Since the Goldwater-Nicholls Act, Congress requires the Executive to publicly declare the National Security Strategy.[3] Since the United States has created a transparent declaration of national security aims, this is the best place to see if the U.S. government places rule of law among the factors contributing to U.S. national security.

The National Security Strategy has expressed support for the rule of law in a variety of ways since the document first appeared. In the first National Security Strategy published by the first Bush Administration, the document mentioned rule of law minimally, as a supporting effort in combatting drug trafficking in Latin America, as well as a method of supporting development in former Warsaw Pact nations.[4] In the August

[3] 10 U.S.C.§ 404a (2012).
[4] GEORGE H. W. BUSH, NATIONAL SECURITY STRATEGY OF THE UNITED STATES (The White House) (1990).

1991 National Security Strategy of the United States, the phrase "rule of law" did not appear.[5] The 1991 strategy mentioned the relationship between laws and national security only in the sphere of countering drug trafficking and controlling immigration.[6] However, by the end of the first Bush administration, rule of law was gaining in importance as a part of U.S. national security. In the 1993 National Security Strategy statement, the White House touted promoting the rule of law as a method of advancing peace and security, especially in Africa, and combatting drug trafficking.[7]

During the Clinton Administration, rule of law gained increased importance as a part of U.S. national security. For the first two years, in the 1994 and 1995 National Security Strategy, the phrase appears only once.[8] In those documents, the administration postulated promoting the rule of law as a way of countering terrorism. In the 1996 National Security Strategy, the Clinton Administration mentioned rule of law two times.[9] In that iteration, the administration advanced the rule of law as both a tool in countering terrorism and a means to encourage replacing autocratic regimes.[10] In the second term of the Clinton Administration the phrase "rule of law" appeared prominently in the National Security Strategy.[11] In that document, the Clinton Administration recognized the need to foster and develop the rule of law, especially in developing democracies and countries emerging from under Soviet control.[12] However, the policy

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[5] GEORGE H. W. BUSH, NATIONAL SECURITY STRATEGY OF THE UNITED STATES (The White House) (1991).
[6] *Id*.
[7] GEORGE H. W. BUSH, NATIONAL SECURITY STRATEGY OF THE UNITED STATES (The White House) (1993).
[8] WILLIAM J. CLINTON, A NATIONAL SECURITY STRATEGY OF ENGAGEMENT AND ENLARGEMENT (The White House) (1996).
[9] *Id*.
[10] *Id*.
[11] WILLIAM J. CLINTON, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY (The White House) (1997). The phrase "rule of law" is used seven times in the document.

[12] *Id*.

portrayed development of the rule of law as a means to better relations in a bilateral or multilateral context, not as a security end in itself. In the second edition of that same National Security Strategy, the Clinton Administration mentioned the rule of law as contributing to national security in almost every area of concern identified in the document, including economic prosperity, strategic mobility, fostering bilateral relationships as well as enhancing law enforcement.[13] In the final National Security Strategy of the Clinton Administration, the strategic policy explicitly recognized the rule of law as a specified interest, but almost in the same breath made it a relatively low priority.[14] Encouraging adherence to the rule of law appeared as a third-tier strategic interest by itself, neither vital nor important, but only humanitarian.[15]

The George W. Bush Administration expressed greater interest in the advancement of the rule of law as an element of national security.[16] President Bush articulated advancing the rule of law as one of the "non-negotiable demands of human dignity".[17] While the language in which the phrase appears is less precise than the Clinton Administrations ordering of priorities, the Bush Administration appears to have elevated the importance of fostering the rule of law from a mere humanitarian concern to an issue of importance. The reader can observe the phrase weaving in and out of all areas of security concern.[18] The policy declared advancing the rule of law to be a key to economic issues affecting national security, especially bilateral and multilateral

[13] *Id*. The phrase "rule of law" appears seventeen times in the document.
[14] WILLIAM J. CLINTON, A NATIONAL SECURITY STRATEGY FOR A GLOBAL AGE (The White House) (2000). The phrase appears twenty-five times throughout the document.
[15] *Id*.
[16] GEORGE W. BUSH, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (The White House) (2002).
[17] *Id*.
[18] The phrase appears ten times in the thirty-four page document. *Id*.

trade.[19] The importance of advancing the rule of law increased as the administration transitioned from immediate conflict situations to post-conflict reconstruction and continuing conflict.[20]

The current administration has continued the policy of advancing the rule of law as an important, but not vital, issue of national security.[21] With language echoing the increasing importance of the rule of law from the past two administrations, the Obama administration currently identifies rule of law as an "essential source of our strength and influence in the world."[22] In the multilateral context, the Obama administration identifies the rule of law as a concept which advances U.S. national security.[23] The document advances rule of law as a method to "hold actors accountable, while supporting both international security and the stability of the global economy."[24] The reader can interpret this sentence as a U.S. commitment to fostering rule of law through international bodies, particularly those bodies which have the ability to decide controversies between states and with respect to individuals in the international arena, such as the World Trade Organization (WTO) and the ICC.

These documents demonstrate the development of the concept of "rule of law" as an independent element of national security interest in the post-Cold War era. This leads to a question as to whether that heightened interest in rule of law has been exhibited deeply through the U.S. government on an interagency level, or whether it remains either empty words on a document or a diplomatic issue alone. Two agencies,

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[19] *Id*.
[20] The phrase appears sixteen times in the fifty-four page 2006 National Security Strategy. GEORGE W. BUSH, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (The White House) (2006).
[21] BARAK H. OBAMA, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES (The White House) (2010).
[22] *Id*., at 2.
[23] *Id*., at 37.
[24] *Id*.

Department of State (DoS) and Department of Defense (DoD), both publish subsidiary supporting strategic statements to the National Security Strategy. DoS has published the first Quadrennial Diplomatic and Development Review, in order to implement the objectives expressed in the National Security Strategy.[25] DoD periodically publishes a National Defense Strategy as a forward looking document building on previous Quadrennial Defense Reviews indicating how it is going to implement the National Security Strategy.[26] Examining DoD and DoS policy documents allows one to gauge the depth of administrative commitment to rule of law as an element of national security.

Given current policy statements, on a strategic level, support for rule of law is a diplomatic, not a military effort. The current National Defense Strategic Guidance does not mention fostering the rule of law, but instead pledges to "make the necessary investments to…operate freely in keeping with our treaty obligations and with international law."[27] This is a departure from the previous statement, where fostering the rule of law was seen as an essential part of joint operations.[28] The DoD statement leaves a rhetorical gap in the Departmental position concerning this relatively important goal. DoS officials, given their reliance on DoD resources, could become nervous about future support to their programs.

The DoS relies on the DoD for fostering the rule of law. DoS, in the Quadrennial Diplomatic and Development Review, explicitly mentioned its partnership with and reliance on the expertise in the DoD in fostering development of the rule of law,

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[25] HILLARY R. CLINTON, LEADING THROUGH CIVILIAN POWER: THE FIRST QUADRENNIAL DIPLOMACY AND DEVELOPMENT REVIEW (U.S. Department of State) (2010) [hereinafter QDDR].
[26] ROBERT M. GATES, NATIONAL DEFENSE STRATEGY (U.S. Department of Defense) (2008).
[27] BARAK H. OBAMA & LEON PANETTA, SUSTAINING GLOBAL LEADERSHIP: PRIORITIES FOR 21ST CENTURY DEFENSE, 8 (U.S. Department of Defense) (2012).
[28] Gates, at 22.

especially in post-conflict environments. As a specific example, the DoS relied on the most recent DoD Quadrennial Defense Review and other DoD departmental statements in arriving at that position.[29] One could see this rhetorical shift becoming an opening for a decrease in actual support of non-DoD programs that receive DoD support through interagency processes.

The fall from prominence of the rule of law as an element of the most current National Defense Strategy is only one data point in the broad spectrum of statements and actions by the DoD with respect to rule of law and supporting the development of rule of law. Other DoD and DoD Component policy statements still voice support for developing the rule of law as an important part of achieving security goals of the United States.[30] For example, a recent National Military Strategy expressed rule of law as one of the pillars of countering and defeating terrorism.[31] However, that policy statement pre-dated the most recent DoD guidance. One can only wait to see if the next iteration of the National Military Strategy follows suit. With the Secretary of Defense making the most recent policy statement, interested parties can watch DoD actions to see if resourcing of rule of law promotion will be drastically changed. Just as this recent DoD policy statement indicates a retrenchment by the DoD into a smaller number of conflicts, in the same way the DoD could decrease the scope of activities pursued within those operations, decreasing post conflict reconstruction activities, including rule of law promotion.

[29] QDDR, at 126.
[30] ROL Handbook, *supra* note 1.
[31] MICHAEL G. MULLEN, THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA (U.S. Department of Defense) (2011).

Given the history of the United States with respect to the ICC, the current DoD guidance would not give one reason to believe the Pentagon should be in favor of the U.S. joining the Court. A counter-intuitive line of reasoning could lead one to the opposite conclusion. A decreasing DoD leaves spaces for other actors, some of which are needed for the U.S. government to maintain its strategic interests. If the ICC can serve as a conflict preventer in some regions of the world, then the DoD can focus its resources elsewhere on other shaping projects, further enhancing U.S. strategic security. Given the context in which the ICC arose, the scaling back of DoD activities could be a window of opportunity for increased U.S. cooperation with the ICC.

III. Brief History of International Criminal Court

The idea of a court for prosecution of individuals traces its roots back to Kantian idealism. Springboarding off the idea of "world government", theorists and diplomats began proposing the formation of international courts as early as the late 19th Century.[32] Even though various governments and theorists discussed the idea of a permanent body of law governing international conflict and other aspects of conduct in the immediate aftermath of World War II, it wasn't until the late 1980s that the current idea of an international court arose. Trinidad and Tobago, unable to prosecute individuals who were using those islands to unlawfully smuggle drugs, suggested a permanent international tribunal to deal with crimes of such international character.[33] After years of negotiations, 148 nations came together in 1998 to hammer out the final details about

[32] GEŌRGIOS PIKĒS, THE ROME STATUTE FOR THE INTERNATIONAL CRIMINAL COURT: ANALYSIS OF THE STATUTE, THE RULES OF PROCEDURE AND EVIDENCE, THE REGULATIONS OF THE COURT AND SUPPLEMENTARY INSTRUMENTS (Martinus Nijhoff Publlishers) (2010).
[33] DAVID SCHEFFER, *The International Criminal Court, in* ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 67 (William Schabas & Nadia Bernaz eds., Routledge) (2011) [hereinafter Scheffer].

the court.[34] The Treaty of Rome (TR), passed that summer, established the ICC.[35] The Court became operational on July 1, 2002, after the required number of nations ratified the TR.[36]

In the initial negotiations from Rome, the U.S. delegation ended with six main objections. These objections included, "the pervasive jurisdiction of the Court, failure to provide a 10-year opt-out period for crimes against humanity and war crimes, an autonomous prosecutor who can (with the consent of at least two judges) initiate investigations and prosecutions in a politically motivated fashion, the lack of a requirement that the Security Council make a determination prior to bringing a complaint for aggression, the possibility of expanding the subject matter jurisdiction of the Court (to include terrorism and drug crimes) and the prohibition against reservations."[37]

Some of these objections are not self-explanatory. The first objection referred to the fact that jurisdiction was allowed over citizens of nations whose government had not consented to the jurisdiction of the court, diminishing national sovereignty. For the second objection, the United States favored treaty parties having the option to prevent the ICC from taking jurisdiction over allegations of crimes other than genocide for up to ten years after ratification. The third and fourth objections are self-explanatory. In the fifth objection, the United States is referring to the method by which the Assembly of State Parties (ASP) operates. The ASP is able to legislate to add crimes to the subject matter jurisdiction of the court without all parties voting for the additional crimes. A party

[34] DAVID SCHEFFER, ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS (Princeton University Press) (2012) [hereinafter Souls].
[35] *Id*.
[36] ALI PAHL, UNITED STATES' OPPOSITION TO THE INTERNATIONAL CRIMINAL COURT: ANALYSIS OF LEGAL AND POLITICAL CULTURAL (Lambert Academic Publishers) (2010).
[37] MARK D. KIELSGARD, RELUCTANT ENGAGEMENT: U.S. POLICY AND THE INTERNATIONAL CRIMINAL COURT (Martinus Nijhoff Publishers) (2010) [hereinafter Kielsgard].

could ratify the RS, but then suddenly find the ICC having authority to investigate and prosecute more offenses than it consented to. This would offend the concept of sovereignty. Finally, the RS requires parties to accept the entire treaty as written, without the ability to object or opt out of the coverage of it for any purpose, as the U.S. has done when ratifying other treaties. The United States also initially opposed the RS because the delegation perceived it infringed too much on state sovereignty.[38] Between 1998 and 1999, the United States worked to change the terms of the treaty to answer its objections.

The central problem, as advanced by the Pentagon, was the risk that U.S. service members would be subjected to prosecution by the ICC. The DoS advanced the U.S. position to achieve immunity for U.S. personnel from ICC jurisdiction. The DoD justified this position philosophically on the demand for U.S. forces to serve in a variety of capacities around the entire world.[39] Academics describe this position as a form of "exceptionalism".[40] The argument started with the position a foreign tribunal cannot take jurisdiction over a U.S. national without United States consent or a UNSC resolution, guarding U.S. sovereign authority.[41] DoD undersecretary for policy Walter Slocombe asserted any exposure of U.S. service members to ICC jurisdiction interfered with U.S. ability to fulfill worldwide military commitments.[42] The DoD did not accept obstacles to the ICC exercising jurisdiction, such as superseding agreements, complementarity and admissibility, as sufficient. In the alternative, the U.S. wanted the ability to control prosecution through UNSC involvement to the greatest extent

[38] *Id*.
[39] Souls*, supra* note 34, at 184.
[40] HAROLD H. KOH, *On American Exceptionalism*, 55 *Stan. L. Rev*, 1483 (2002-2003) [hereinafter Koh].
[41] Souls, at 176.
[42] *Id*., at 184.

possible.[43] The U.S. also wanted the Court to have no jurisdiction over persons from nations who were not party to the treaty, providing an absolute ability to avoid jurisdiction. The U.S. position, being absolute in nature, was unattainable.[44] Being disappointed by the Treaty of Rome, the United States instead, over a process of two years, observed an international entity it could not control the putative authority, however remote, of either limiting its strategic instruments or requiring a modification to its operations. The rest of the world continued creating the ICC, setting up a situation where the U.S. saw the ICC as a dangerous trend with respect to U.S. interests. Due to these perceived flaws, the United States began opposing the Court.

From 2001 to 2004, the United States took a series of actions designed to oppose the operation of the Court and achieve the goal of American immunity from ICC jurisdiction.[45] First, in 2001, the United States declared it was not a party to the Treaty, even though it had signed the treaty on the 31st of December, 2000.[46] Second, the United States negotiated a series of "bilateral non-surrender agreements", agreeing with many nations mutually to not surrender nationals to the ICC.[47] Third, the U.S. attempted to block UN funding to continuing operations in Bosnia, citing the potential for ICC jurisdiction over U.S. peacekeepers.[48] None of these tactics had a lasting effect. One act, however, has had a remarkably negative effect, not only on U.S. participation in the Court, but also on the operation of the Court itself.

[43] *Id*.
[44] *Id*, at 193.
[45] Kielsgard, *supra* note 37, at 132.
[46] *Id.*
[47] *Id*, at 140.
[48] *Id*, at 133.

The U.S. Congress made a legislative statement of its objections to the ICC in 2002 through the American Service Members' Protection Act (ASPA).[49] Congress relied on the testimony of the chief U.S. negotiator at the Rome Conference, Ambassador David Scheffer, in recording some of its objections.[50] Congress objected to the possibility of U.S. forces on a humanitarian mission in the territory of a member state being subject to the ICC's jurisdiction without U.S. consent.[51] Congress further objected to the ICC as not allowing for basic rights guaranteed U.S. citizens, including the right to a trial by jury.[52] As well, the legislature found the crime of aggression opened the possibility of U.S. civilian executives being potentially prosecutable for crimes when attempting to validly respond to or prevent terrorism, nuclear proliferation or other acts of aggression.[53] Finally, Congress found the ICC's role in prosecuting the crime of aggression to be infringing on the role of the U.N. Security Council, hampering deterrent efforts of that body.[54] Based on those objections, the Congress decided to reject U.S. participation in the ICC, and even went further in actively hindering the work of the ICC.

ASPA severely curtails U.S. participation or support of ICC activities.[55] It also currently prohibits any entity of the United States or any state to assist the ICC, except in a few exceptional cases. The statute prohibits government at every level from assisting the Office of the Prosecutor (OTP) in conducting investigative activities.[56] No

[49] 22 U.S.C. § 7421 (2012).
[50] *Id*.
[51] *Id*.
[52] *Id*.
[53] *Id*.
[54] *Id*.
[55] *Id*.
[56] *Id*.

government officials at any level may extradite any suspect to the ICC.[57] No treasury at any level may use funds to assist the Court.[58] The President may waive these prohibitions.[59]

Since 2005, the United States has taken positions of decreasing opposition to the operations of the ICC.[60] First, the United States did not oppose prosecutorial investigation in the situation in Darfur when that issue came up for a vote in the UN Security Council. Second, the U.S. supported the referral of the Darfur indictments, and abstained when the UNSC voted on a resolution to suspend the indictment on an annual basis. Third, the U.S. did not even attempt to interfere in the *propriu motu* investigation by the Office of the Prosecutor into the situation involving post-election violence in Kenya. The financial restrictions under ASPA expired in 2008 and were not renewed in 2009, greatly diminishing the effect of that statute.[61] Finally, the U.S. actively supported ICC involvement in the situation in Libya. However, the U.S. has not changed its policy sufficiently so as to describe it as fully in support of the ICC, or even just sitting on the sidelines and observing. A recent incident serves to illustrate the inconsistent nature of the current U.S. position.

After the referral of the Libyan situation to the ICC, the OTP began investigational activities, including interviewing former Qaddafi regime officials wherever and whenever they could. The Chief Prosecutor, Mr. Ocampo, had an opportunity to interview the Libyan ambassador to the United Nations in October 2011 when the General Assembly

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[57] *Id*.
[58] *Id*.
[59] *Id*.
[60] LEE FEINSTEIN, MEANS TO AN END: U.S. INTEREST IN THE INTERNATIONAL CRIMINAL COURT (Brookings Institution Press) (2009) [hereinafter Feinstein].
[61] *Id*., at 53.

began. As a matter of proper procedure, Mr. Ocampo coordinated with the New York City Police Department (NYPD), asking for assistance in arranging for a place to conduct an interview to help in the investigation. The NYPD official informed the prosecutor that the ASPA categorically prohibited not only assistance to him, but also prohibited him from even conducting investigative activities while on U.S. soil.[62] While the United States will no longer seek to punish or prosecute those who assist the ICC, failing to assist the ICC in simple investigative activities that are clearly within the jurisdiction of the Court and in the interest of the United States works contrary to the rule of law. In order to understand the effect of U.S. intransigence, it is important to consider how the ICC affects development of the rule of law throughout the world.

IV. Role of International Criminal Court in Rule of Law

One of the important concepts in the rule of law is the equal application of the law not only on individuals who are subject to the law but also to the state itself. If the law rules the state with equal force, then it rules the individuals who serve the state. This concept is in direct opposition to the concept of impunity, where state officials, particularly heads of state, are immune from prosecution for their acts and decisions in the interest of the state, regardless of the impact on the individual.

The ICC furthers the rule of law by effectively limiting, if not entirely eliminating, impunity for individuals who commit offenses under the jurisdiction of the Court.[63] While sovereign immunity may still exist for numerous delicts and offenses, the TR stands for the proposition that impunity does not extend to the most serious offenses. In this way the RS fosters the rule of law. With the elimination of individual impunity, enforced

[62] LUIS MORENO OCAMPO, *Prosecutor, International Criminal Court, Interview by Author, Medford, MA, January 18, 2012,*
[63] Kielsgard, *supra,* note 37, at 3.

through the principle of complementarity, the RS enhances the authority of states in the international system.

The drafters incorporated complementarity into the RS, making the ICC a court of last resort. The Court operates only to compliment national courts.[64] The statute envisions national courts and national criminal justice systems as the primary means by which perpetrators of the grave crimes defined under the TR are prosecuted. The text of the TR expresses this plainly.[65] The RS also defines a specific relationship between the UNSC and the ICC, making the ICC again an instrument of last resort available in cases the UNSC decides to make a referral.

The concept of complementarity keeps states in a primary role. Even with states being in a primary role, the United States maintains other objections to joining the Court.[66] If these objections are unjustified, the U.S. has acted contrary to its national security interest in maintaining them and not ratifying the TR.

V. Continuing U.S. Objections to Court and Subsequent Developments

Over the years, the initial United States objections, both official and more casual, to the International Criminal Court have evolved from the initial six. The current administration maintains three main concerns with the developments within the ICC.[67] The three remaining objections to the RS involve the effect of the crime of aggression,

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[64] Souls*, supra* note 34 at 175

[65] Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90 (1998) [hereinafter RS]

[66] S. Comm on Foreign Relations, INTERNATIONAL CRIMINAL COURT REVIEW CONFERENCE, KAMPANA, UGANDA, MAY 31-JUNE 11 2010: A JOINT COMMITTEE STAFF TRIP REPORT PREPARED FOR THE USE OF THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE (Washington, DC: GPO,[2010]) [hereinafter Kampala Report].

[67] Harold H. Koh, Legal Advisor, & Stephen J. Rapp, Ambassador-at-Large for War Crimes, U.S. Department of State, U.S. Engagement with the ICC and the Outcome of the Recently Concluded Review Conference (June 15, 2010),at 8, *available at* http://www.cfr.org/international-criminal-courts-and-tribunals/koh-rapps-remarks-us-engagement-international-criminal-court-outcome-icc-assembly-states-parties-conference-june-2010/p22454 [hereinafter Koh & Rapp].

concerns regarding appropriate due process for defendants before the Court, and the independence of the prosecutor allowing for politically motivated prosecutions. Each of these remaining objections should be examined to see if they are still valid.

The initial concern was that the crime of aggression as defined by the RS is not the same definition of the crime of aggression under customary international law. The United States believes this will have two effects. First, states will be more strategically constrained in their use of force for legitimate purposes than is necessary, allowing dangerous conditions to remain unchecked. Second, individuals that thought, in good faith, they were operating properly and within the bounds of law may find themselves on the wrong end of an ICC inquiry.[68]

The second concern about the crime of aggression relates to the relationship with the UNSC. The US reasons since the UN Charter gives the UNSC plenary authority to determine if a state has engaged in aggression, then an ICC investigation or prosecution for the same type of act should only occur after the UNSC has passed a resolution stating it believes aggression has taken place. If the ICC or its Prosecutor takes steps before the UNSC has made any sort of decision on the situation, this will interfere with the authority of the Security Council.[69]

A U.S. delegation observed the final definition of the crime of aggression achieved at the Kampala Conference in July 2010 with interest.[70] The same delegation, through working within the system as an official observer, achieved significant changes to the ICC investigatory and prosecutorial powers with respect to the crime of aggression. One could say the U.S. got everything it wanted, and more. Through a

[68] Kampala Report, *supra* note 66, at 4.
[69] *Id*.
[70] *Id*.

series of understandings, the U.S. delegation convinced the Assembly of State Parties (ASP) to define key terms restricting the substantive coverage of the statute finally adopted as Article 8bis of the RS.[71] The ASP defined the word "manifest" limiting the scope of criminal activities under the spectrum of acts of aggression to those sufficiently grave and widespread in nature to trigger prosecution. Even so, the U.S. has basic concerns regarding the scope of the substance of the crime.

The definition of the crime of aggression potentially differs from the definition of the same from customary international law. Under customary international law, established through the post-World War II tribunals, the basic prosecutable act is pursuit of a war of aggression, previous called crimes against peace, not an act of aggression.[72] U.S. policy makers argue this change in wording makes the statute unacceptable. The potential for planning and executing a prosecutable offense can have operational ripples throughout the U.S. Armed Forces. As one recent example, U.S.-manned ISAF aircraft bombarded Pakistani positions mistakenly, and Pakistani officials alleged the act was an act of "blatant aggression."[73] By using that particular phrase, Pakistani Army Major General Nadeem could be seen as putting NATO members who are parties to the Rome Statute, such as Britain and France, on notice of the potential for adverse legal action through the ICC. The U.S. tries to avoid scenarios where membership in the ICC gives a non-U.S. party an avenue of "lawfare" against the United States and its allies.[74] While the United States, if an ICC party, would likely not

[71] *Id*.
[72] Pikēs, supra note 32, at 7
[73] *Pakistan Army Says NATO Attack was Blatant Aggression* (Reuters), Jan. 26, 2012, *available at http://www.reuters.com/article/2011/11/30/us-pakistan-nato-idUSTRE7AT0JZ20111130.*
[74] Charles J. Jr Dunlap, *Does Lawfare Need an Apologia is Lawfare a Useful Term,* 43 Case W. Res. J. Int'l L. 121 (2010-2011) [hereinafter Dunlap].

be investigated for an act of aggression for this incident, due to the numerous hurdles placed in front of the ICC and the OTP prior to commencing to do anything at all, the possibility still exists of allegations and investigations. But even with such investigations, the results of the Kampala Conference should allay U.S. concerns over the ICC taking personal jurisdiction over U.S. personnel. First, the statute only applies to those who are at the highest levels of military planning.[75] Second, the understanding with respect to the word "manifest" indicates that only deliberate and widespread aggressions trigger criminal culpability.[76]

The Kampala Conference and its resulting agreements should be an acceptable answer to the United States on the issue of whether the Rome Statute's treatment of the crime of aggression is contrary to U.S. national interests. The additional understandings placed the scope of the statute in a roughly congruent position to the historical coverage of "crimes against peace". Regardless of the variance of the statute from the potential meaning of "aggression" under customary international law, expressing the crime in writing logically decreases vagueness, embodying one of the primary principles of rule of law. Especially with the additional understandings arrived at concerning the scope of the statute, the United States should reasonably have no additional operational constraints based on this particular statute.

At the Kampala Conference, the U.S. delegation was able to convince the assembly to place the U.N. Security Council as a check on the ICC in most cases of investigating or prosecuting the crime of aggression. The Security Council must be

[75] RS, Art. 8bis, ¶ 1.
[76] Kampala Report, *supra* note 66, at 8.

consulted and specifically refer certain situations, or the ICC has no jurisdiction.[77] These agreements effectively guarantee United States officials will never be investigated or prosecuted for criminal aggression absent U.S. consent. These agreements have consequences with respect to U.S. national interests, both good and bad. As intended, since the ICC may not investigate or prosecute nationals of non-parties without an affirmative resolution by the UNSC, the United States may exercise its veto over any situation which may arise where U.S. officials are targeted for violating this particular criminal statute where the government nevertheless feels the action was both justified and non-criminal. The RS allows America to be exceptional, able to intervene in situations like Libya or Iraq without the additional risk of facing ICC prosecution. On the negative side, U.S. allies remain unprotected from rogue state aggression without that same U.N. Security Council resolution. In a real-world example, North Korea could shell a South Korean island, causing harm and death, with relative impunity knowing the U.N. Security Council would likely not refer the situation for ICC prosecution.

The ICC may assert personal jurisdiction over a national from a non-ICC party, if the individual is involved in crimes occurring on the territory of a state party, even if the U.N. Security Council has not considered the matter itself.[78] From a U.S. point-of-view, this ability is problematic. This ICC authority offends the U.S. conception of the primary principle of sovereignty.[79] A sovereign nation holds jurisdiction over its citizens, wherever they are. Therefore, the offender is, theoretically, amenable to his or her

[77] *Id*., at 9.
[78] RS*,* Art. 12.
[79] PHILIPP MEISSNER, THE INTERNATIONAL CRIMINAL COURT CONTROVERSY: AN ANALYSIS OF THE UNITED STATES' MAJOR OBJECTIONS AGAINST THE ROME STATUTE (Transaction Publishers 2005).

domestic courts exercising jurisdiction and conducting a trial. The United States favors national courts as the answer to this issue.[80]

Legal analysis of the U.S. objection leads to the conclusion this particular objection is not valid.[81] If a third-party national is on the territory of a state party to the ICC, then the RS is part of the laws of that state. That national, by virtue of his or her presence, is subject to the laws of that state. By application, that national is then subject to the RS, and therefore amenable to the jurisdiction of the ICC for the defined offenses. The territorial state-party, naturally, has primary jurisdiction over the individual. The state of origin of the individual also has concurrent jurisdiction. However, the idea that the third-party national should be subject not to the jurisdiction of the territorial state where he or she is present, but instead to the jurisdiction of his or her state of citizenship, is an application of extraterritorial jurisdiction which is not favored under international law.

When all of the U.S. concerns are considered together, the main problem the United States has with the ICC is the possibility of the Court becoming the tool of a party adverse to the United States, with the opposing party using the ICC to conduct "lawfare" against U.S. military forces and the executive. One can easily envision several situations where a hostile party targets the United States using the ICC. For example, Tunisia has recently joined the ICC. However, Tunisia, having recently emerged from under authoritarian rule and going through a period of transition, is a location where it is possible for Al Qaeda to establish a presence. Assume that Al

[80] Stephen J. Rapp, U.S. Ambassador at Large for War Crimes, *U.S. Statement to the Assembly of States Parties of the International Criminal Court* (December 14, 2011), *available at* http://www.state.gov/j/gcj/us_releases/remarks/179208.htm.
[81] Meissner, at 40.

Qaeda establishes an operational cell in Tunisia and the United States gains sufficient intelligence about the cell to take action against it. If the United States, after deciding Tunisia was unable to deliver a particular Al Qaeda operative into U.S. custody, decided to use military methods to strike the target in Tunisia, Tunisian officials could easily ask the OTP to investigate such act as in violation of the Treaty of Rome.

Such an event could even gain traction. If the operation caused no civilian casualties, Tunisia could ask for the incident to be examined as an act of aggression. If the operation caused civilian casualties, Tunisia could also allege the civilian casualties were an incidence of war crimes. Since the ICC prosecutor conducts his operations fairly openly, even the possibility of an investigation of an allegation can have a chilling effect on U.S. operations. The RS mechanisms mitigate those possibilities.

The review and oversight performed by the ICC Pre-Trial Chamber (PTC) diminishes the possibility of such an investigation. If the prosecutor, *propriu motu*, attempts to initiate an investigation of an alleged offense received, a PTC must first review the allegation and evidence.[82] An examination of their biographical information would generally show these judges are of sufficient maturity to be able to stop an overreaching prosecutor.[83] While the judges may not have the judicial qualities to avoid all criticism, they are sufficient at least for this purpose. However, several significant additional factors ensure the United States should not really be concerned with this potential.

[82] Jann K. Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions (Oxford University Press 2008).
[83] *ICC - Pre-Trial Division* (March 9, 2012), http://www.icc-cpi.int/menus/icc/structure of the court/chambers/pre trial division/pre trial division?lan=en-GB.

The treaty text contains the most potent answer to any question concerning U.S. personnel becoming subject to the jurisdiction of the ICC. Article 17 of the treaty places hurdles in front of the Court even approaching a situation, both through jurisdictional and admissibility limits.[84] The most powerful limit on the jurisdiction of the Court is that the Court's jurisdiction is complimentary to national criminal jurisdictions.[85] Due to complementarity, the ICC has no jurisdiction over a situation, issue or case if a national criminal jurisdiction has either investigated or prosecuted the case in question. At a tactical level, a military investigation, conducted in good faith, which results in a decision of no prosecution to be pursued, removes any possibility of an ICC investigation or prosecution.[86] At a strategic level, the release of the results of these investigations, showing the transparency of the U.S. process can be a regular practice of positive lawfare by the United States, demonstrating an application of the rule of law, preventing abuse of the ICC.[87] As a further advantage, releasing such investigations to the OTP can serve to prevent potentially detrimental attempts by national jurisdictions to exercise alleged universal jurisdiction over U.S. officials for crimes covered by the Rome Statute.[88]

While not as powerful an answer, the practice of the OTP over the past nine years also shows that the United States would not be unfairly targeted for "lawfare". In one example, British Army interrogation abuses in Basra were reported to the OTP for investigation and prosecution. The OTP declined to investigate the reported war crimes

[84] RS, Art. 17.
[85] RS, Art. 1.
[86] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M 303 and R.C.M 405 (2008). R.C.M. 303 and R.C.M. 405 both provide for the military conducting investigations into its own misconduct.
[87] Dunlap, *supra* note 74, at 122.
[88] Center for Constitutional Rights, *German War Crimes Complaint Against Donald Rumsfeld, Et Al* (March 9, 2012). http://ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld-et-al.

for two reasons. First, the Prosecutor stated the British Army was already investigating and prosecuting all alleged abuses. Second, the Prosecutor stated the amount of abuse which occurred was beneath the level of gravity needed to require ICC attention.[89] In a second example, the OTP's recent decision to not decide whether the Palestinian Authority is a state shows the OTP to be a restrained office, not prone to being used as a tool for lawfare.[90] The current administration has stated they are satisfied the OTP and the ICC, as a result, is "appropriately focused."[91]

Third, the fact of U.S. international law practice when involved in military operations virtually ensures the United States will not have individuals subjected to ICC jurisdiction without its consent. The Unites States has a series of international agreements, including both regular Status of Forces agreements and bilateral non-surrender agreements, which ensure that a U.S. national would not be surrendered to the jurisdiction of the ICC without U.S. consent.[92] Given the extensive practice of the United States that preserves its primacy with respect to jurisdiction over its nationals, discovering factors arguing against United States accession to the Rome Statute is difficult at best.

Finally, the RS answers U.S. concerns about potential investigations or prosecutions for past actions of U.S. officials. The treaty limits the temporal jurisdiction of the Court in two ways. First, no crime committed prior to the entry into force of the Treaty, 1 July 2002, is within the jurisdiction of the Court. Second, the Court only has

[89] William A. Schabas, *Complimentarity in Practice: Some Uncomplimentary Thoughts*, 24, Presentation at 20th Anniversary Conference of the International Society for the Reform of Criminal Law (June 23, 2007), *available at* http://www.isrcl.org/Papers/2007/Schabas.pdf.
[90] Office of the Prosecutor, *ICC - Update on Situation in Palestine* (April 3, 2012), *available at* http://www.icc-cpi.int/menus/icc/structure of the court/office of the prosecutor/comm and ref/palestine/update on situation on palestine.[hereinafter Palestine].
[91] Koh & Rapp*, supra* note 67, at 8.
[92] Scheffer, supra note 33 at 79

jurisdiction over crimes of a particular state-party after the state-party has acceded to the Statute.[93] If the United States became a member of the ICC, acts of officials of the United States occurring prior to the ratification date would be entirely off-limits to the ICC and the OTP.

While not part of the overtly advanced difficulties the United States has with the ICC, it is worth examining whether the ICC complies with fundamental conceptions of justice, or whether it is, in the words of the late Senator Jesse Helms, a "kangaroo court." The ICC, being a relatively new institution, is experiencing what could be described as growing pains. Several sources have criticized the Court for its lack of results.[94] In matters of adjudication, however, it is more helpful to examine the process rather than the result. Judge David Admire, a retired Washington State criminal court judge, examined the process and procedure of the Court and published a thorough criticism. His first main point of criticism was that the process by which the Court's judges are selected does not result in a competent trial judiciary.[95] He determined the statute allows for academics and legal administrators instead of experienced legal practitioners to serve. He confirmed this criticism by examining the experience level of the current judges, finding their level of experience uneven.[96] His second main criticism was that these judges are then not given additional training to make up for shortfalls in experience.[97] Finally, he examined the Court procedural and evidentiary rules,

[93] Id. 74
[94] Feinstein,*supra* note 60, at 62
[95] David Admire, *International Criminal Court Revisited: An American Perspective, the,* 15 Tex. Rev. L. & Pol. 341 (2010-2011).
[96] *Id*.
[97] *Id*., at 349.

determining the areas where the protections offered were different than the protections offered by a United States court.[98]

These particular criticisms of the ICC are not ones which should ultimately invalidate the legitimacy of the Court, or stand in the way of the United States becoming a party. Granted, the bench of the ICC is not uniformly composed of the most experienced criminal law practitioners. Judge Admire observed one-third of them lack any trial experience. However, even the United States Constitution has no explicit minimum requirements for becoming a Federal judge.[99] The judges selected for the ICC are either experienced in criminal law or international law.[100] They are distinguished by nomination from their own country and then election by the Assembly of State-Parties.[101]

With respect to individual rights, the ICC also protects individual rights in substantially the same manner as at least some U.S. courts. For example, at the ICC, a person is not guilty of an offense unless two-thirds of the judges in a trial chamber vote that the person committed the offense beyond a reasonable doubt.[102] Military courts-martial allow a finding of guilt under similar circumstances, not requiring unanimity.[103] Other individual rights, such as the right to a speedy trial, exclusion of certain evidence and presumption of innocence, are clearly expressed by the Rome Statute, but not in exactly the same manner as often expressed under U.S. criminal justice systems. A detailed comparison between the contours of the U.S. expression of these rights and

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[98] *Id*., at 350.
[99] U.S. CONST. art. III, § 1.
[100] *Rome Statute of the International Criminal Court,* Art. 36
[101] Admire, at 345.
[102] *Id*., at 351.
[103] MCM, *supra* note 86, R.C.M. 921

the ICC statutory language leads to the conclusion the rights are roughly congruent in extent.[104] Judge Admire, as a representative critic of the ICC, while accurate in his comparison between the two systems, misses the larger picture. No international tribunal, not even Nuremberg, operated precisely according to United States standards. To expect the same would be unreasonable. The rules of the ICC in general have established standards of reasonableness and justice, taking into account the different nature of the crimes within its jurisdiction. Just as the United States allows some variance for courts-martial and military commissions when compared to ordinary civilian courts, the ICC has a similar amount of variance. This variance is entirely understandable, given the nature of the situations from which criminal charges arise which are considered by the Court. While at variance from the best U.S. practices, the procedures of the ICC do not subject defendant to a process the United States would consider unconstitutional.[105]

VI. Additional Advantages: Rule of Law Promotion, "Lawfare" and Shifting Practices in U.S. National Security

As a general matter, without absolute illegality or unconstitutionality standing in the way, the decision of whether or not to pursue Senate ratification for the Treaty of Rome and become a full member of the ICC is a policy decision. In deciding good policy, the best policy maximizes the benefit to U.S. national security interests. Conceptually, one can envision the various arguments both for and against the United States joining the ICC. The arguments Congress made against the United States joining the ICC in the ASPA were generally legal in nature. While these legal difficulties

[104] U.S.double jeopardy roughly corresponds to ICC *ne bis in idem*. U.S. exclusionary rules under the 4th Amendment are expressed in the ICC Statute, but give discretion to the judges to allow some evidence based on a reliability standard. Admire, at 358.
[105] Souls, *supra* note 34, at 238

are important, it is equally important to consider the impact accession could have on the operation of the executive in pursuing national security interests.

In absolute terms the ICC and the RS place theoretical limits on the United States in the means available for pursuit of international policy ends. Many of these limits are non-objectionable, since the means falling under the prohibition of the treaty would not be means the United States would use in any case. For example, the United States would not seek to use acts prohibited as acts of genocide or crimes against humanity. The obvious examples are not problematic. The difficult issues arise around the margins of the treaty, where an act the U.S. currently claims as within its prerogative to do may fall within the list of prohibited acts. While the earlier discussion of a potential U.S. drone attack on an Al Qaeda operative raised the possibility of an accusation of criminal aggression, other previous United States acts pursued for national security purposes could also fall within the list of prohibited acts. Mining of Nicaraguan harbors during the Reagan administration could be considered an act of armed aggression, as part of a blockade. The quarantine of Cuba during the Cuban Missile Crisis could also similarly be characterized as an act of aggression on the part of the United States.[106] More recently, and more troublingly, U.S. practices in placing alleged terrorists in confinement in Guantanamo Bay, Cuba and other places could have been alleged to be enforced disappearance of these people, representing a crime against humanity. Also troublingly, the United States would be subjecting its interrogation methods to international review, risking them being adjudged a form of torture.[107] These very real restrictions may represent a decrease in the options available to the United States.

[106] RS, Art. 8bis.
[107] Id. However, since Congress adopted the Army interrogation manual as the only approved method for conducting interrogation, this risk is now suitable diminished. 42 U.S.C. §2000dd (2012).

These restrictions must be balanced with the advantages gained by the United States joining and supporting the ICC.

The first major advantage the United States achieves by supporting the ICC is promoting the rule of law. The Treaty of Rome represents a significant development in the rule of law internationally. The Treaty implies that no individual may have impunity for grave crimes, either against his or her own nation or against other nations.[108] The elimination of such impunity will serve the interests of the United States better than preserving flexibility.

By promoting the ICC, the United States can more efficiently promote international peace and security through the rule of law. A robust ICC operating with U.S. and UNSC becomes a negotiating tool the aforementioned authorities can use to avoid or cut off conflict. The ICC exists as both a shield and a sword when thinking about armed conflict. The ICC exists as a sword, being the device by which an offending party can be brought to justice when his or her own national courts lack the capacity to do the same.[109] The ICC also exists as a shield, serving a deterrent purpose that can be used effectively by the UNSC or the U.S. in its diplomatic efforts.[110] For example, Afghanistan is a member of the ICC. If Iran were allowing its territory to be used as a safe haven or as a staging ground for insurgent attacks, the Government of Afghanistan could use the additional weight of potential ICC prosecution as additional leverage with Iran to compel Iran to act in such a fashion as to secure that border.[111]

[108] Id., Preamble
[109] Kleffner, at 321.
[110] *Id*, at 322.
[111] Dunlap, *supra* note 74, at 124.

The United States can gain significantly by increasing its support to the ICC. As Ambassador Scheffer essentially recommended to President Clinton, the best way to reform a flawed judicial body is from the inside.[112] The United States would have an opportunity to have its legal personnel working inside all the organs of the ICC to improve its functioning. While Judge Admire criticized the competence of the ICC judges, the United States could affect that directly by nominating more competent judges to the ICC and then supporting those judges fitting the desired profile for selection. The same reasoning applies to criticisms of the ICC regarding timeliness. With the United States supporting the ICC, international relations with the other state-parties would necessarily improve, enhancing U.S. strategic security.

The United States is entering a period where it employs a different class of actors to achieve strategic security goals. The DoS employs greater and greater numbers of contractors in overseas situations. In Iraq, the U.S. Embassy oversees approximately 15,000 contractors, 5,000 of whom are armed security contractors, continuing reconstruction and security support to the Government of Iraq begun by U.S. armed forces in 2003.[113] As the United States approaches 2014 and withdrawing armed forces from Afghanistan, a similar situation can develop in that country, although under more direct government of Afghanistan control.[114] The United States relies more than ever on private companies to provide security in a post conflict environment.

Facilitating the increasing use of U.S. nationals as contractors in stability operations in Afghanistan and other locations is a significant argument for the U.S.

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[112] Souls*, supra* note 34, at 234.
[113] Tom Bowman, *No U.S. Troops, but an Army of Contractors in Iraq,* NPR (December 27, 2011), *available at* http://www.npr.org/2011/12/27/144198497/no-u-s-troops-but-an-army-of-contractors-in-iraq.
[114] Heidi Vogt, *Afghan Private Security Handover Looking Messy,* WASHINGTON TIMES, February 12, 2012.

becoming a member of the ICC. Security contractors currently operate according to a code of conduct under which they agree to abide by all international laws, including the Treaty of Rome.[115] This code of conduct has been in place for four years. Since the contractors themselves already operate within the limits of the Rome Statute, having their state of incorporation also become a member to the same treaty would present absolutely no operational difference to the contractor. The contractor would instead likely experience an enhanced ability to compete for stability operations contracts. The fact of the contractor's home state being a party to the ICC would serve as a type of guarantee of quality for the services being provided by the contractor, ensuring no detrimental incidents would occur.[116] With the United States being a party to the ICC, host nations would be more likely to accept the presence of U.S. based contractor personnel.[117] In an era where the United States is seeking to significantly decrease the size of its armed forces, having the operational flexibility to be able to achieve similar ends through using stability operations contractors can significantly contribute to national security goals.

The United States could establish a position to its advantage in international and transnational conflicts through joining the ICC. Labeled "lawfare" by Air Force MG Charles Dunlap, this strategic level effort uses non-military legal actions to create pressure on an adversary in an international conflict.[118] Past examples of such strategic

[115] International Stability Operations Association, *ISOA Code of Conduct Version 12,* (2009) *available at* http://stability-operations.org/printableversions/Code_of_Conduct_ISOA_v12.pdf.
[116] *E.g.* Maria Shriver, *Sounding the Alarm on Human Trafficking, http://www.mariashriver.com/blog/2011/01/sounding-alarm-human-trafficking (*January 11, 2011*).*
[117] Interview with Doug Brooks, President, International Stability Operations Association, at ISOA Annual Summit, Washington, D.C. (October 24, 2011).
[118] Dunlap,*supra* note 74, at 122.

efforts included crafting sanctions, implementing financial seizures and creating post-conflict tribunals.[119]

In the abstract, an international criminal court can have a positive effect on U.S. operations. If the International Criminal Court were to indict an individual the United States was adverse to, this indictment would provide additional legitimacy as a basis for using military forces in pursuit of justice. Obtaining a tribunal indictment, and then publicizing it in the conflict area, is a method of decreasing popular support for the leadership of the adverse party.[120] Several current flash points in international relations serve to show the usefulness of the United States supporting the International Criminal Court.

While the United States has severe reservations about ICC jurisdiction over the crime of aggression, one current example stands as a reason for the United States to increase support to the ICC. Over the decades, North Korea has acted in a manner that could easily be characterized as a series of acts of criminal aggression. The most recent example is where North Korean forces shelled a South Korean island, causing fatalities and destruction.[121] As it stands now, the ICC has no jurisdiction over North Korea, but South Korea is a state party. Assume North Korea makes a similar attack after Article 8bis comes into force, not earlier than 2017. The ICC could then seek an indictment against North Korean military and civilian leadership for violating the proscription against criminal aggression. That indictment could increase the effective

[119] *Id*.
[120] David M. Crane, *Take Down: Case Studies regarding Lawfare in International Criminal Justice: The West African Experience, the Lawfare and War Crimes Tribunals,* 43 Case W. Res. J. Int'l L. 201 (2010-2011), 210.
[121] Jack Kim and Lee Jae-Won, *North Korea Shells South in Fiercest Attack in Decades,* REUTERS, November 23, 2010, *available at* http://www.reuters.com/article/2010/11/23/us-korea-north-artillery-idUSTRE6AM0YS20101123.

pressure on the North Korean regime, serving as an additional international condemnation of its actions.

Mexico is a state-party to the Treaty of Rome. As such, it could request the OTP to investigate mass atrocities if it is unable to do the same itself. In the ongoing criminal conflict in Mexico, upwards of 10,000 people have been killed by the drug cartels, possibly with the cooperation of individuals nominally part of the Mexican state or federal government. The heads of these drug cartels operate with effective impunity. If the U.S. supported a Mexican Government request for an ICC prosecutorial investigation or indictment, this would provide greater legitimacy to both the Mexican Government and any U.S. material or military support to the investigation or pursuit of indicted suspects. By using this international legal forum, the United States proactively sets the tone of physical operations to follow. These operations could include both cooperative law enforcement measures as well as use of military forces to assist the OTP in carrying out his mandate. In the alternative, at the invitation of the Mexican government, the U.S. could use both law enforcement and military personnel to assist the Mexican government in regaining law enforcement capability over its territory, aiming at the current U.S. preferred solution of "positive complementarity".[122]

The current strategic situation in Africa indicates U.S. interests would be well-served by more actively supporting the ICC, up to and including accession to the Rome Statute. AFRICOM, the U.S. African Command, has in the past fostered events designed to encourage and enhance the rule of law in Africa.[123] More recently, the U.S. African Command has endeavored to assist Uganda in removing the Lord's Resistance

[122] Rapp, *supra* note 80.
[123] Nicole Dalrymple, *AFRICOM Hosts First Africa Military Legal Conference, nearly 15 African Nations Participating,* USAFRICOM, May 19, 2010, *available at http://www.africom.mil/printStory.asp?art=4438.*

Army, and its leader, Joseph Koney, from the field.[124] The United States has not mentioned the International Criminal Court arrest warrant currently out for Joseph Koney. Koney allegedly refused to demobilize because he could not negotiate a withdrawal of the same arrest warrant.[125] The United States could enjoy an additional measure of legitimacy for its deployment of forces to Uganda if the Soldiers were explicitly given the authority to arrest Koney pursuant to the ICC arrest warrant, rather than just the "capture or kill" authority that they are operating under. This legitimacy is explicitly expressed as in the U.S. national security interest.[126] While having an additional justification above the invitation of the host-nation is not necessary, the additional legitimacy inherent in acting on behalf of another international institution, especially a purportedly non-political legal institution, would logically enhance U.S. national security interests.

For the past several years, the United States has had a task force dedicated to enhancing international security in the Horn of Africa. Recently, one of the major irritants in that region, the conflict between Sudan and South Sudan, was resolved by the creation of the nation-state of South Sudan. However, the conflict situation has not entirely gone away. For example, armed conflict recently arose over border issues between the two nations, specifically in the area of Abeyei. One purpose of the ICC is deterrence of grave crimes, now including the crime of armed aggression.[127] Supporting the ICC could affect its ability to deter aggressions such as this one,

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[124] U.S. AFRICOM Public Affairs, ***FACT SHEET: U.S. Military Support to African Efforts to Counter the Lord's Resistance Army*** *,* Mar 09, 2012, *available at http://www.africom.mil/getArticle.asp?art=7702.*
[125] BBC News, *US to Send Troops to Uganda to Help Fight LRA Rebels*, October 14, 2011, *available at http://www.bbc.co.uk/news/world-africa-15317684.*
[126] Obama, *supra* note 41.
[127] Edward S. White, *Is Participation in the ICC in the Strategic Interest of the United States Commentary,* 6 Eyes on the ICC 50 (2009-2010).

especially by encouraging South Sudan to become a member of the ICC. However, encouraging another nation to become a member of the ICC is disingenuous if the United States is not seeking to become a member itself, but is instead a tremendously negative form of exceptionalism, fostering a double standard.[128] If the United States genuinely supported the International Criminal Court, its operations in the Horn could be legally enhanced.

VII. Conclusions

The Obama Administration has emphatically identified the rule of law as a component of U.S. national security interest. One of the more important considerations in considering whether the ICC would serve to support advancing that particular national security goal is the basic question of the nature of the Court itself. In an address at Harvard University, ICC Prosecutor Luis Moreno-Ocampo posed the issue as one of whether the most recent actions of the ICC in Libya represent an increasing justice trend spreading throughout the world, or whether it is the UNSC playing international politics as usual.[129] He proposed the most recent actions in Libya represented a movement to increase the rule of law through the ICC, which he believed was a hopeful sign, setting limits on the actions which governments can take by eliminating impunity for grave crimes.[130]

The UNSC's relatively quick legal action referring the situation in Libya to the ICC stands in stark comparison to the same body's inaction with respect to the Syrian

[128] Koh, *supra* note 40.
[129] Luis Moreno Ocampo, Prosecutor, Int'l. Crim. Ct., *The International Criminal Court Case in Libya: A New Legal Paradigm? A Public Address by Luis Moreno-Ocampo,* at Harvard Kennedy School of Government, (November 16, 2011) *available at http://www.youtube.com/watch?feature=player_embedded&v=Rcpe2vc6MiI*.
[130] *Id*.

governments' alleged atrocities. As Prosecutor Ocampo explained, because Syria is not voluntarily subject to the RS, he has no jurisdiction to do anything in Syria, even if he receives numerous allegations of mass atrocities, unless the UNSC refers the situation to him for investigation.[131] Since Russia and China have steadfastly vetoed the U.S. supported UNSC resolutions expressing disapproval of Syrian government atrocities,[132] it follows they would also veto any resolution referring the matter to the ICC. Since this a situation where the national courts of Syria are unlikely to investigate or prosecute members of the government, this would seem to be an appropriate case for ICC referral. However, the United States is not is a position to advocate for granting the ICC jurisdiction to either investigate or prosecute the perpetrators, since the United States is not a party to the statute. Because the United States is not willing to entertain the slightest risk inherent in being subjected to the jurisdiction of the ICC, the U.S. government is deprived of the opportunity to advocate expanding the rule of law through referring the situation in Syria to the ICC. By choosing to support "positive complementarity" over other potential policies, the U.S. government has passed on the opportunity to engage in some symbolic "lawfare" of its own.

One can intuitively conclude the U.S. loses international prestige from losing opportunities such as this one. Since the U.S. objections to the ICC are either diminishing in importance or simply incorrect, this is doubly disturbing. The ICC record over the past ten years shows it is not a political body, but is instead a justice body, meaning the United States does not risk an unwarranted, politically motivated

[131] *Id*.
[132] Louis Charbonneau & Michelle Nichols, *U.S., UN Slam Syria Over Violence; Russia Concerned*, REUTERS, March 12, 2012, *available at http://in.reuters.com/article/2012/03/12/syria-un-idINDEE82B0GW20120312.*

investigation or prosecution.[133] Further, at least in the opinion of the U.S. Department of Justice, no valid legal or constitutional objection exists to this treaty.[134] Therefore, accession becomes a straight policy discussion driven cost-benefit analysis decision.

Since accession to the Treaty of Rome is a decision which, if made rationally, comes down to a cost-benefit analysis, intuitively acceding to the treaty is in the United States' best interest. Accession would effectively immunize officials for actions occurring prior to the date of accession. Accession supports advancing the rule of law, an acknowledged national security goal. Accession would allow the United States to encourage other states to become party to or submit to the jurisdiction of the Court without any hint of hypocrisy or exceptionalism. The U.S. would then be able to rely on the ICC as a backstop when pursuit of positive complementarity is ineffective, as well as being able to use the potential for ICC prosecution itself as a "lawfare" tactic.

Even though it is in the interest of the United States to accede to the Treaty of Rome, politically accession is not possible for the foreseeable future.[135] Domestic opposition to engaging in this treaty is too strong to be overcome. That does not mean the Obama administration cannot take any initiatives with respect to the ICC to strengthen it. Prosecutor Ocampo stated the repeal of the American Servicemember's Protection Act would greatly enhance his office's ability conduct its business, especially when coordinating law enforcement support from U.S. law enforcement organizations.[136] Given the opposition to increasing involvement in the ICC, full repeal of the ASPA is as unlikely as accession to the ICC. However, certain portions of the

[133] Palestine, *supra* note 90.
[134] Souls, *supra* note 34, at 240.
[135] Kampala Report*, supra* note 66, at ii.
[136] Luis Moreno Ocampo, Prosecutor, International Criminal Court, Interview, Medford, Massachusetts, January 18, 2012.

ASPA which hinder support to the ICC could be amended out of the act, without disturbing those portions of the act purporting to protect U.S. service members. This compromise could be beneficial to all parties involved, without being a political bridge too far.

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